IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2019-266

STATE OF VERMONT

v.

MAX MISCH

On Appeal from the Superior Court, Criminal Division, Bennington Unit
Docket No. 173-2-19 Bncr

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY SUPPORT FUND IN SUPPORT OF APPELLANT STATE OF VERMONT

On the Brief:

Eric Tirschwell
William J. Taylor, Jr.
Mark Anthony Frassetto
Everytown Law
450 Lexington Avenue
P.O. Box 4184
New York, NY 10017
(646) 324-8215 voice
(917) 410-6932 facsimile
wtaylor@everytown.org

O. Whitman Smith
Mickenberg, Dunn, Lachs & Smith, PLC
P.O. Box 406
Burlington, VT 05042-406
(802) 658-6951 voice
(802) 660-0503 facsimile
whit@mickdunn.com

Counsel for Amicus Curiae Everytown for Gun Safety Support Fund

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INTEREST OF AMICUS CURIAE

Amicus curiae Everytown for Gun Safety Support Fund ("Everytown") is the education, research, and litigation arm of Everytown for Gun Safety, the nation's largest gun violence prevention organization, with millions of supporters across all fifty states, including thousands in Vermont. Everytown for Gun Safety was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed in the wake of the murder of twenty children and six adults in an elementary school in Newtown, Connecticut by an individual using a firearm with a large-capacity magazine ("LCM"). Everytown's mission includes defending gun safety laws through the filing of amicus briefs that provide historical context and doctrinal analysis that might otherwise be overlooked. Everytown has drawn on its expertise to file briefs in numerous cases challenging laws under the Second Amendment or parallel state constitutional provisions, including cases challenging LCM prohibitions like those at issue in this case. *See, e.g.*, *Duncan v. Becerra*, No. 19-55376 (9th Cir.); *Wilson v. Cook Cty.*, No. 18-2686 (7th Cir.); *Worman v. Healey*, No. 18-1545 (1st Cir.); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*,

No. 18-3170 (3d Cir.); *State v. Weber*, No. 19-0544 (Ohio). It seeks to do the same here.[1]

INTRODUCTION

This case concerns the right of Vermont residents to be free from gun violence and their power to enact laws to protect that right. In light of the increasing toll of mass shootings, and in response to recent gun massacres in places such as Parkland, Florida; Las Vegas, Nevada; Sutherland Springs, Texas; Orlando, Florida; Newtown, Connecticut; and Aurora, Colorado—as well as "an averted attack at Fair Haven Union High School in this State" (Super. Ct. Order at 1)[2]—the people of Vermont sought legislation last year that would limit their risk of dying in such horrific crimes. Their efforts resulted in 13 V.S.A. § 4021, which generally prohibits the possession, purchase, sale, or manufacture of LCMs that can hold more than ten rounds of ammunition for long guns or more than fifteen rounds of ammunition for handguns. Those are precisely the type of magazines used in these and other recent mass shootings.

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[1] An addendum of historical gun laws accompanies this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

[2] *See State v. Sawyer*, 2018 VT 43, ¶¶ 5-10, 187 A.3d 377 (discussing the threatened Fair Haven mass shooting).

Defendant is charged with two counts of violating § 4021. He moved below to dismiss those charges, arguing that the statute violates Article 16 of Chapter I of the Vermont Constitution, which provides "[t]hat the people have a right to bear arms for defense of themselves and the State."[3] In denying Defendant's motion on this basis, the superior court joined every federal and state appellate court, including the Second Circuit, to have considered a Second Amendment or parallel state constitutional challenge to a law like Vermont's prohibiting LCMs.[4] All have upheld the constitutionality of such measures. None has held to the contrary.[5]

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[3] Defendant also moved to dismiss under the Common Benefits Clause of Chapter I, Article 7 of the State Constitution. While this amicus brief addresses directly only Article 16, Everytown fully endorses the State's other arguments for affirmance as well.

[4] *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *Worman v. Healey*, 922 F.3d 26, 30 (1st Cir. 2019), *petition for cert. docketed*, No. 19-404 (filed Sept. 25, 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 122-24 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *Commonwealth v. Cassidy*, 96 N.E.3d 691, 702-03 (Mass. 2018), *cert. denied*, 139 S. Ct. 276 (2018); *Rocky Mountain Gun Owners v. Hickenlooper*, 2018 COA 149, ¶¶ 1, 44 (Colo. Ct. App. 2018), *cert. granted*, 2019 WL 1768233 (Colo. Apr. 22, 2019); *see also Wilson v. Cook Cty.*, 937 F.3d 1028, 1029, 1035-37 (7th Cir. 2019) (reaffirming *Friedman*)

[5] In *Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018), an unpublished decision, the Ninth Circuit affirmed, under an abuse-of-discretion standard, a district court's grant of a preliminary injunction against California's law prohibiting LCMs. Other courts have placed little weight on *Duncan*, recognizing the the outcome was tethered to the specific evidentiary record before the district court and that the

This Court has not yet ruled in such a case. Nor has it definitively resolved the proper constitutional test under Article 16. But the Court has made clear that, as is true with the Second Amendment, Article 16 "does not suggest that the right to bear arms is unlimited and undefinable." *State v. Duranleau*, 128 Vt. 206, 210, 260 A.2d 383, 386 (1969); *see District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("[T]he right secured by the Second Amendment is not unlimited."). And, as the superior court correctly held, no matter the standard of review applied here—whether the "reasonableness test" adopted by other states and under other provisions of the Vermont Constitution or the "two-prong test" employed by the federal courts—§ 4021 does not violate the right to bear arms.

Everytown files this amicus brief to urge this Court to join the unanimous appellate authority, affirm the superior court's denial of Defendant's motion to dismiss, and uphold the State's common-sense, life-saving measure—and, in particular, to make two points.

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majority's opinion was "not a general pronouncement about whether LCM bans violate the Second Amendment." *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 123 n.29. In a subsequent decision on the merits, the district court granted summary judgment to the plaintiffs, finding that the California law violated the Second Amendment and the Equal Protection Clause. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019). That district court decision was in error, *see, e.g.*, Everytown Law, *Why the Gun Lobby's Favorite Court Decision Is Wrong*, Medium (May 28, 2019), https://bit.ly/2O7iO2K, and it is currently on appeal. *See Duncan v. Becerra*, No. 19-55376 (9th Cir. Apr. 4, 2019).

First, § 4021 is part of a long tradition of regulating weapons that legislatures have determined to be unacceptably dangerous—including a century of restrictions on firearms capable of firing a large number of rounds without reloading. This historical tradition alone is sufficient for this Court to find the law constitutional. Defendant's contrary assertion that LCMs and similar "repeating firearms" (*i.e.*, "those that can fire multiple times without reloading") "have been in common use for over 500 years" (Def.'s Motion to Dismiss at 6) is belied by the historical record.

Second, even if § 4021 is found, or assumed, to regulate conduct protected by Article 16, it passes constitutional scrutiny. Research conducted by Everytown, as well as other social science and statistical evidence, demonstrates that LCMs make both mass shootings and day-to-day gun violence more deadly, which supports the conclusion that there is a reasonable fit between Vermont's LCM prohibition and the State's public safety concerns.

ARGUMENT

I. Vermont's LCM Prohibition Is Part of a Longstanding History of Identical and Analogous Prohibitions.

In moving for dismissal below, Defendant attempted to rely on "historical precedent" in support of his position, arguing that large-capacity magazines have been in common use, in one form or another, for over 500 years—and that Vermont's regulation and prohibition of these magazines, through 13 V.S.A. §

4021, thus cannot stand under Article 16. But this is not so. The historical record, including a long history of analogous regulation, does nothing to help Defendant here. It instead confirms that Vermont's law is constitutional.

A. History Is an Important Part of the Article 16 Analysis.

History has an important place in the Court's analysis. It plays a critical role under the federal Second Amendment inquiry. A law does not violate the Second Amendment if it does not infringe "conduct that was within the scope of the Second Amendment as historically understood." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Put differently, "longstanding prohibitions" fall outside the scope of the right because they are treated as tradition-based "exceptions" by virtue of their "historical justifications." *Heller*, 554 U.S. at 627, 635; *see Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) ("Longstanding prohibitions . . . fall outside of the Second Amendment's scope."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[L]ongstanding limitations are exceptions to the right to bear arms."); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 258 n.76 (concluding same).

As the superior court recognized, similar considerations exist in assessing the validity of a law under Article 16. Regardless of the constitutional test applied—whether the reasonableness standard adopted by many states or the two-step, intermediate-scrutiny framework favored by the federal courts—"the

threshold inquiry . . . is whether the challenged law even implicates Article 16, that is, whether it burdens conduct protected by the constitutional provision." (Super. Ct. Order at 5.) And, in undertaking the Article 16 analysis, the superior court properly noted that "[g]uidance . . . may . . . be obtained from federal courts construing the Second Amendment." (*Id.*); *see, e.g.*, *State v. Porter*, 164 Vt. 515, 518, 671 A.2d 1280, 1282 (1996) (noting that a challenger "bears the burden of providing an explanation of how or why the Vermont Constitution provides greater protection than the federal constitution").

Federal courts have made clear that to qualify as a "longstanding prohibition" outside the scope of the right to bear arms, a law need not "mirror limits that were on the books in 1791" or "boast a precise founding-era analogue." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *Nat'l Rifle Ass'n of Am. v. Bur. of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012). To the contrary, even "early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 779 F.3d at 997; *see United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (noting that even laws that are "firmly rooted in the twentieth century and likely

bear[] little resemblance to laws in effect" at the founding can be deemed longstanding).[6]

13 V.S.A. § 4021, while a new enactment in Vermont, is consistent with such a history and tradition. In particular, it is part of a long tradition of regulating or prohibiting weapons that lawmakers have determined to be unacceptably dangerous—including a century of restrictions enacted shortly after semi-automatic weapons capable of firing a large number of rounds without reloading became widely commercially available. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 67-68, 72 (2017) (explaining that "[firearm] laws were enacted not when these weapons were invented, but when they began to circulate widely in society"). Many of these laws were passed around the same time as the prohibitions on sales to felons and the mentally ill and restrictions on commercial arms sales, all laws that the U.S. Supreme Court identified in *Heller* as longstanding and therefore valid. *See Heller*, 554 U.S. at 626-27, 635; *see also* Spitzer, *Gun Law History*, at 82 (discussing the passage of prohibitions on possession of firearms by felons and the mentally ill in the early 20th century and on the possession of semi-automatic

[6] *See also, e.g.*, *Friedman*, 784 F.3d at 408 (noting that "*Heller* deemed a ban on private possession of machine guns to be obviously valid" despite the fact that "states didn't begin to regulate private use of machine guns until 1927," and that "regulating machine guns at the federal level" did not begin until 1934).

weapons with LCMs in the 1920s and 1930s). Defendant's effort to rebut this history fails.

B. There Is a Longstanding Tradition of Prohibiting Firearms Capable of Quickly Firing Multiple Rounds Without Reloading.

States have regulated the ammunition capacity of semi-automatic firearms since shortly after these firearms first became widely commercially available at the turn of the twentieth century. *See* Robert Johnson & Geoffrey Ingersoll, *It's Incredible How Much Guns Have Advanced Since the Second Amendment*, Business Insider (Dec. 17, 2012), https://bit.ly/2B0DVKO (explaining that semi-automatic weapons became commercially available in the early 1900s). Such laws often categorized large-capacity, semi-automatic firearms, along with fully automatic weapons, as "machine guns," and imposed restrictions that effectively prohibited them entirely. *See, e.g.*, 1927 R.I. Pub. Laws 256, §§ 1, 4 (prohibiting the "manufacture, s[ale], purchase or possess[ion]" of a "machine gun," which it defined as "any weapon which shoots more than twelve shots semi-automatically without reloading"); 1927 Mich. Pub. Acts 887, § 3 (prohibiting possession of "any machine gun or firearm which can be fired more than sixteen times without reloading").

In 1928, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) adopted a model law prohibiting possession of "any firearm which shoots more than twelve shots semi-automatically without

reloading," setting the national standard for laws prohibiting possession of semi-automatic firearms with large magazine capacities. *See* Report of Firearms Committee, 38th Conference Handbook of the National Conference on Uniform State Laws and Proceedings of the Annual Meeting 422-23 (1928).[7] Shortly thereafter, the federal government enacted a similar prohibition applicable to the District of Columbia. *See* 47 Stat. 650, ch. 465, §§ 1, 14 (1932) (making it a crime to "possess any machine gun," which it defined as "any firearm which shoots . . . semiautomatically more than twelve shots without loading"). Even the National Rifle Association endorsed passage of the D.C. law, saying, "it is our desire [that] this legislation be enacted for the District of Columbia, in which case it can then be used as a guide throughout the states of the Union." S. Rep. No. 72-575, at 5-6 (1932).

Many states followed the federal government's lead, regulating firearms based on magazine capacity. California, for example, prohibited not only "all firearms . . . capable of discharging automatically," but also "all firearms which are automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device *having a capacity of greater than ten*

[7] This standard originated with a model law promulgated by the National Crime Commission in 1927. *Id.*

cartridges." 1933 Cal. Stat. 1170, § 3 (emphasis added).[8] Several other states, including Minnesota, Ohio, and Virginia, also prohibited or regulated firearms based on magazine capacity.[9] Still other states passed laws limiting possession of automatic weapons based on the number of rounds that a firearm could discharge without reloading.[10]

As this historical record shows, § 4021 is the continuation of nearly a century of valid restrictions based on the ability to shoot large numbers of rounds in a short time without reloading. *See* Robert J. Spitzer, *There's No Second Amendment Right to Large-Capacity Magazines*, N.Y. Times, (Aug. 5, 2019), https://nyti.ms/2k0qo0S ("The regulation of ammunition-feeding devices in this

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[8] This law was at least as restrictive as § 4021, and indeed appears more restrictive inasmuch as it prohibited *firearms* capable of receiving LCMs, rather than only the LCMs at issue here. *See id.*

[9] *See* 1933 Minn. Laws 232, § 1 (prohibiting "[a]ny firearm capable of automatically reloading after each shot is fired, whether firing singly by separate trigger pressure or firing continuously" if the weapon was modified to allow for a larger magazine capacity than the original design); 1933 Ohio Laws 189, § 1 (requiring a $5000 bond to possess "any firearm which shoots more than eighteen shots semi-automatically without reloading"); 1934 Va. Acts 137, § 1 (prohibitively regulating possession or use of "weapons . . . from which more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise discharged without reloading").

[10] These limitations were all more stringent than Vermont's law. *See* 1933 S.D. Sess. Laws 245, § 1 (five rounds); 1933 Tex. Gen. Laws 219, § 1 (five rounds); 1934 Va. Acts 137, § 1 (seven rounds for automatics, 16 for semi-automatics); 1931 Ill. Laws 452, § 1 (eight rounds); 1932 La. Acts 337, § 1 (eight rounds); 1934 S.C. Acts 1288, § 1 (eight rounds).

country dates back nearly a century. From 1927 to 1934, 16 states enacted laws that restricted magazine capacity . . . ."). As such, the statute qualifies as a longstanding prohibition, which, accordingly, *see supra* Part I.A, falls outside the scope of the Second Amendment and for the same reasons should be found to fall outside the scope of Article 16.

C. Vermont's Law Is Consistent with Centuries of Laws Prohibiting Weapons Deemed to Be Especially Dangerous.

13 V.S.A. § 4021 is also part of a long history of government prohibition of weapons that pose heightened threats to public safety, either because the weapons themselves are especially dangerous or because they are particularly suitable for criminal use. Such prohibitions date back to early English legal history, beginning with the 1383 prohibition of launcegays (a particularly lethal type of spear) and the 1541 prohibition of crossbows and firearms less than a yard long. *See* 7 Ric. 2, 35, ch. 13 (1383); 33 Hen. 8, ch. 6, § 1 (1541). The regulation of especially dangerous weapons continued as the American colonies and first states adapted the English tradition. *See generally* 1763-1775 N.J. Laws 346 (prohibiting set or trap guns[11]);

[11] This type of weaponry referred to "the practice of rigging firearms to be fired with a string or similar method to discharge a weapon without an actual finger on the firearm trigger." Spitzer, *Gun Law History*, at 67.

The Laws of Plymouth Colony (1671) (same); Records of the Colony of New Plymouth in New England 230 (Boston 1861) (same).

States continued to pass prohibitions or regulations on such weapons after ratification of the Second Amendment. This included Vermont, which passed prohibitions, similar to those in other states and in the colonies, on spring or trap guns. *See* 1884 Vt. Acts & Resolves 74, § 1; 1912 Vt. Acts & Resolves 261. Several states also banned or prohibitively taxed Bowie knives,[12] which were determined to be "instrument[s] of almost certain death." *See Cockrum v. State*, 24 Tex. 394, 402 (1859) (finding Bowie knives are "differ[ent] from [guns, pistols, or swords] in [their] device and design" and are therefore more accurate and lethal than other contemporary weapons). In addition, a number of states prohibited certain types of small and easily concealable handguns, which were determined to be ideal for criminal use.[13]

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[12] *See* 1837 Ala. Laws 7, § 1 (prohibitively taxing Bowie knives); 1837 Ga. Laws 90 (banning Bowie knives); 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (justifying a prohibition on Bowie knives on the basis that they are "weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin").

[13] *See* 1881 Ark. Acts § 1909 (pocket pistols and "any kind of cartridge[] for any pistol"); 1879 Tenn. Pub. Acts 135, ch. 96, § 1 ("belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistol"); 1907 Ala. Law 80, § 1 (similar); 1903 S.C. Acts 127, § 1 (similar).

Throughout the early twentieth century, as the technology of firearms and other dangerous weapons evolved, states continued to update their laws. Many states passed laws targeting urban crime that prohibited weapons like slung-shots, blackjacks, and daggers.[14] States, including Vermont, similarly prohibited dangerous weapon features, such as silencers. *See* 1912 Vt. Acts & Resolves 310, § 1.[15] And, in the 1920s and 1930s, at least 28 states and the federal government passed prohibitions or severe restrictions on automatic weapons, along with the restrictions on large capacity semi-automatic weapons discussed above. *See supra* Part I.B.

Within this historical context, Vermont's prohibition on LCMs should be understood as the continuation of a longstanding tradition of government prohibition or regulation of especially dangerous weapons. This long history of analogous regulation further supports the conclusion that § 4021 does not "burden[] conduct protected by [Article 16]." (Super. Ct. Order at 5.)

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[14] *See, e.g.*, 1917 Cal. Stat. 221, ch. 145, § 1 (blackjacks and billy clubs); 1911 N.Y. Laws 442, ch. 195, § 1 (slung-shots); 1917 Minn. Laws 614, ch. 243, § 1 (brass knuckles); 1913 Iowa Acts 307, ch. 297, § 2 (daggers and similar-length knives); 1927 Mich. Pub. Acts 887, No. 372, § 3 (explosives).

[15] *See also, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1913 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39, ch. 137, § 1 (same); 1926 Mass. Acts 256, ch. 261 (same); 1927 Mich. Pub. Acts 887-89, § 3 (same); 1927 R.I. Pub. Laws 256, § 1 (same).

D. The Existence of Weapon Designs, Experimental Weapons, and Unusual Weapons Capable of Firing Multiple Rounds Without Reloading Does Not Limit the Ability of States to Regulate Dangerous Weapons.

Defendant ignored all of this history in the superior court. Instead, he asserted that "[l]arge capacity magazines and/or repeating arms have been a part of traditional arms for over *five-centuries*," citing to the existence of several weapons at or prior to the founding period. (Def.'s Mot. to Dismiss, App. B. at 1.) But he failed to mention that those were largely experimental, oddities, or very expensive, and thus unlikely to spur or necessitate government regulation. Their existence thus cannot rebut the historical record supporting LCM prohibitions.

Defendant, for example, pointed in his motion to dismiss to Lewis and Clark's Girandoni air rifle, which he calls "the state-of-the-art repeater" when the Second Amendment and Article 16 were ratified. (*Id.* at 2.) But he failed to mention that only around 1,500 of this rifle were ever produced—most of which were owned by the Habsburg Empire—and, to function, it required a sensitive and difficult-to-manufacture air tank, which took 1,500 strokes of a hand pump to charge. National Rifle Association, *Girandoni Air Rifle as Used by Lewis and Clark*, https://bit.ly/1mU3PA6 (Feb. 1, 2011); S.K. Wier, *The Firearms of the Lewis and Clark Expedition*, https://bit.ly/323mpS9 (Aug. 11, 2010). Other founding-era weapons partially mechanized the reloading process, similarly allowing for larger firing capacities. *NFM Treasure Gun—Cookson Volitional*

Repeating Flintlock, NRA National Firearms Museum, https://bit.ly/2XiHTH9. As described by a senior curator at the NRA's National Firearms Museum, however, such weapons were "most unusual." *Id.* Simply stated, there is no evidence at all that these kinds of "large capacity arms" (Def.'s Mot. to Dismiss at 6) were widely owned in early America, let alone used in the kinds of criminal activity likely to trigger regulation.

The failure to regulate a product that was rarely owned, and not widely used in crime until 120 years afterwards, cannot be evidence of the historical understanding of the scope of the right. The relevant historical record here is instead as follows: In the second half of the nineteenth century, firearms capable of being fired multiple times without reloading became less unusual; around the turn of the twentieth century, semi-automatic weapons became more popular, which, combined with larger replaceable magazines, allowed for much more lethal weapons; and, as explained above, *see supra* Part I.B, states began to regulate these weapons shortly thereafter. That history, which remains unrebutted, fully supports the constitutionality of § 4021.

II. The Use of LCMs Makes Mass Shootings and Other Gun Violence Incidents Deadlier.

Even if 13 V.S.A. § 4021 were not longstanding and thus outside the scope of Article 16 (which it is, *see supra* Part I), it should still be upheld as

constitutional under both the reasonableness test and intermediate scrutiny.[16] As the superior court recognized, the use of LCMs makes shootings more dangerous and more deadly. (Super. Ct. Order at 6 (noting that it is "well documented that large-capacity magazines allow more shots to be fired from a weapon, with a consequent greater potential for casualties and severity of injuries" (citing *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 263-64)).) The data supports this assertion: Everytown's analysis, as well as other relevant research, demonstrates that the use of LCMs—whether in mass shootings or day-to-day gun violence—results in more people being shot, more injuries per victim, and more deaths. By prohibiting the sale and future possession of LCMs throughout Vermont, § 4021 is a reasonably tailored attempt to address this serious public safety concern—and thus, for this reason as well, it is constitutional.

Everytown's research. Relying on press coverage and police reports, Everytown has tracked and documented mass shootings since 2013 and has released several reports summarizing this data. While Everytown cannot present a comprehensive dataset of the magazines used in every mass shooting (the reality of

[16] At most, intermediate scrutiny is appropriate because, as the superior court observed, the law restricts neither firearms themselves nor the number of lawful magazines a person may possess, and thus "the burden § 4021 imposes on conduct protected by Article 16 is minimal." (Super. Ct. Order at 5.) Indeed, Defendant has conceded that no stricter standard applies. (*See* Def.'s Motion to Dismiss at 14.)

gun violence is that mass shootings are so frequent that this information is not available in every instance), the information that is available clearly demonstrates that LCMs make shootings significantly more deadly.

Data compiled by Everytown consistently show that mass shooting incidents involving LCMs result in significantly more shooting victims and significantly more deaths. The evidence here could not be clearer. Everytown's most recent mass shootings report, which analyzed data from 2009 to 2017, demonstrates that of the 60 mass shootings where magazine size was known, those that involved the use of LCMs led to *14 times* as many people injured and *twice* as many deaths compared to mass shootings that did not involve use of an LCM. Everytown for Gun Safety, *Mass Shootings in the United States: 2009-2017* (Dec. 6, 2018), https://every.tw/1XVAmcc [hereinafter *Everytown 2018 Mass Shootings Report*].

Everytown's tracking of mass shootings also shows that LCMs are invariably used in the most deadly and injurious events. *Id.* These include:

- The attack at an office party in San Bernardino, California, that resulted in fourteen deaths and twenty-two injuries;
- The shooting at a country-western bar in Thousand Oaks, California, that left twelve dead and at least ten injured;
- The shooting at a movie theater in Aurora, Colorado that killed twelve and injured seventy;
- The attack on a school in Newtown, Connecticut that killed twenty-six people;

- The massacre of forty-nine people and wounding of fifty-three more in a nightclub in Orlando, Florida;

- The attack in Las Vegas, Nevada in which the shooter used dozens of assault weapons and LCMs to fire hundreds of rounds into a concert crowd resulting in the death of fifty-nine people and the injury of over 500 more;

- The attack on a high school in Parkland, Florida that resulted in the death of seventeen people and wounding of seventeen more[17]; and

- The shooting at a church in Sutherland Springs, Texas that resulted in twenty-six deaths and twenty injuries.[18]

Indeed, in each of the ten deadliest mass shootings in modern American history, an LCM was used to perpetrate the crime.[19]

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[17] The federal district court in *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1161, 1177 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019), which was relied on by Defendant below, asserted that the Parkland shooter used only 10-round magazines to carry out his attack at Marjory Stoneman Douglas High School (MSD). But that is false. In its official report, the MSD Public Safety Commission made clear that LCMs were used, noting that "[e]ight 30- and 40-round magazines were recovered from the scene," some of which "had swastikas etched into them." MSD Public Safety Commission, *Initial Report to the Governor, Speaker of the House of Representatives and Senate President*, at 240, 262–63 (Jan. 2, 2019), https://bit.ly/2YWjWKN; *see also* Everytown Law, *Why the Gun Lobby's Favorite Court Decision Is Wrong*, Medium (May 28, 2019), https://bit.ly/2O7iO2K; *supra* note 5.

[18] *See Everytown 2018 Mass Shootings Report*, https://every.tw/1XVAmcc; Everytown, *Appendix to Mass Shootings in the United States: 2009-2016*, at 3, 6, 24, 26 (2017), https://every.tw/2JPBIVz; Violence Policy Center, *Mass Shootings in the United States Involving High-Capacity Ammunition Magazines* (June 2019), https://bit.ly/32aOCpO [hereinafter *VPC Report*].

[19] These shootings are: Las Vegas, Nevada (58 fatalities); Orlando, Florida (49); Blacksburg, Virginia (32); Newtown, Connecticut (26); Sutherland Springs, Texas (26); Killeen, Texas (23); San Ysidro, California (21); Parkland, Florida

Mass shootings involving LCMs are also "highly salient" events that have a unique impact that policymakers may consider when weighing policy choices. *Friedman*, 784 F.3d at 412. Shootings like those that occurred at Newtown, Las Vegas, Parkland, San Bernardino, Thousand Oaks, Virginia Tech, Sutherland Springs, and Aurora sear themselves into the national consciousness and affect the way people live their everyday lives. *See, e.g.*, Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, Pew Research Ctr., (Apr. 18, 2018), https://pewrsr.ch/2Y0m0gi (results of a survey conducted in the two months following the Parkland shooting showed that a majority of U.S. teens (57%), and most parents (63%), fear a shooting could happen at their school); Steve LeVine, *School Shootings Have United Gen Z and Young Millennials*, Axios, Jan. 8, 2019, https://bit.ly/33maWgz (recent poll showing that school shootings are the number one issue for American youth, with 68% of people aged 14-29 say that school shootings are the most important issue facing the nation); Sophie Bethune, *APA Stress in America Survey: Generation Z Stressed About Issues in the News but Least Likely to Vote* (Oct. 30,

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(17); Austin, Texas (15); and San Bernardino, California (14). *See* Bonnie Berkowitz, Denise Lu, & Chris Alcantara, *The Terrible Numbers That Grow With Each Mass Shooting*, Wash. Post, (June 5, 2019) (continually updated), https://wapo.st/2CMznZz; *VPC Report*, https://bit.ly/32aOCpO.

2018), https://bit.ly/2IJtwr0 (according to the American Psychological Association, 75% of young people ages 15-21 say that mass shootings are a significant source of stress); Alana Abramson, *After Newtown, Schools Across the Country Crack Down on Security*, ABC News (Aug. 21, 2013), http://abcn.ws/1KwN9Ls (comparing the impact of the Sandy Hook shooting on school security to that of 9/11 on airport security and noting that school districts have spent tens of millions of dollars on security improvements). While shootings on the scale of these tragedies remain statistically rare compared to the plague of day-to-day gun violence, their enormous impact reinforces the compelling justifications for Vermont's LCM prohibition.

Other social-science research. Additional research also supports the conclusion reached by the State that LCMs pose significant dangers to public safety.

The evidence here is substantial. State prohibitions on large-capacity magazines are correlated with a 63% lower rate of shootings with three or more injuries or deaths. *See* Sam Petulla, *Here is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN, (Oct. 5, 2017), https://cnn.it/2J4sWCC (noting Boston University Professor Michael Siegel's conclusion that "[w]hether a state has a [LCM] ban is the single best predictor of the mass shooting rate in that state"). Mass shootings were also 70% less likely to occur between 1994 and 2004, when the

federal prohibition on assault weapons and large-capacity magazines was in effect. *See* Charles DiMaggio, *Changes in U.S. Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86 J. of Trauma and Acute Care Surgery 11, 13 (2018) https://goo.gl/R8qSgK.[20]

Likewise, several studies indicate that criminals are increasingly using LCMs in day-to-day gun violence, as evidenced by the increasing number of LCMs recovered by police.[21] Indeed, a recent study found that "LCM firearms . . . appear to account for 22 to 36% of crime guns in most places, with some estimates upwards of 40% for cases involving serious violence." Christopher S. Koper et al., *Criminal*

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[20] *See also* Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* 240-43 (2016) (finding that, compared with the 10-year period before the federal ban went into effect, the number of gun massacres where six or more people were shot and killed fell by 37% during the ban period and the number of people dying from gun massacres fell by 43%, and that gun massacres increased by 183% and massacre deaths by 239% in the decade after the ban lapsed); Christopher Ingraham, *It's Time to Bring Back the Assault Weapons Ban, Gun Violence Experts Say*, Wash. Post., (Feb. 14, 2018), https://wapo.st/2JjFlSk (discussing Klarevas's research).

[21] *See, e.g.*, Brian Freskos, *Baltimore Police Are Recovering More Guns Loaded With High-Capacity Magazines, Despite Ban on Sales*, The Trace, (Mar. 27, 2017), https://goo.gl/fgWrc7 (noting a more than 5% increase in the percentage of guns recovered with LCMs by Baltimore police from 2010 to 2016); David Fallis, *Data Indicate Drop in High Capacity Magazines During Federal Ban*, Washington Post, (Jan. 10, 2013), http://wapo.st/2wV9EMX (noting that the percentage of LCM-equipped guns recovered by Virginia police decreased during the federal LCM prohibition, but then more than doubled between its expiration in 2004 and 2013).

Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources, J. Urban Health (Oct. 2017), https://bit.ly/2MRVqkd. That same study found that LCMs pose a particular threat to law enforcement: "LCM weapons overall account for 41% of the guns used to kill [police] officers." *Id.*

When criminals use LCMs, they generally fire more shots and cause more injuries.[22] For example, a study of Milwaukee homicides found that those killed with guns containing LCMs had on average one additional gunshot injury than when a gun without an LCM was used, and the Maryland medical examiner's office reported that the number of cadavers with ten or more bullets more than doubled between 2006 and 2016, the years following the expiration of the federal prohibition in 2004. *See, e.g.*, Jeffrey Roth & Christopher Koper, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994*: Final Report, Urban Institute, (1997), http://urbn.is/2wQKkrA; Justin George, *Shoot to Kill: Why Baltimore is One of The Most Lethal Cities in America*, Baltimore Sun (Sept. 30, 2016), https://bsun.md/2da4nci. Shootings with more injuries invariably lead to

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[22] Christopher Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, National Institute of Justice (2004), http://bit.ly/2vBTGTX (finding that handguns associated with gunshot injuries are up to 50% more likely to have LCMs than handguns used in other crimes and that guns used in shootings resulting in injuries are nearly 26% more likely to have LCMs).

more deaths. As one leading study found, gunshot victims shot twice are 60% more likely to die than those shot once. *See* Koper, *supra* note 22, at 87; s*ee also* Daniel W. Webster et al., *Epidemiologic changes in gunshot wounds in Washington, D.C. 1983-1990*, 127 Archives of Surgery 694 (1992) (finding that the fatality rate for multiple chest wounds is 61% higher than the fatality rate for a single chest wound).

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In sum, whether this Court looks to the most recent empirical research, conducts a historical analysis of relevant laws, or looks to guidance from other state and federal courts, the outcome is the same: § 4021 should be upheld.

CONCLUSION

For the reasons stated above, the superior court's decision denying Defendant's motion to dismiss should be affirmed.

DATED at Burlington, Vermont this 14TH day of October, 2019.

O. Whitman Smith
Mickenberg, Dunn, Lachs & Smith, PLC
P.O. Box 406
Burlington, VT 05042-406
(802) 658-6951 voice
(802) 660-0503 facsimile
whit@mickdunn.com

Counsel for Amicus Curiae Everytown for Gun Safety Support Fund

On the Brief:

Eric Tirschwell
William J. Taylor, Jr.
Mark Anthony Frassetto
Everytown Law
450 Lexington Avenue
P.O. Box 4184
New York, NY 10017
(646) 324-8215 voice
(917) 410-6932 facsimile
wtaylor@everytown.org